BEFORE THE FAIR EMPLOYMENT AND HOUSING COMMISSION
OF THE STATE OF CALIFORNIA

In the Matter of the Accusation of the DEPARTMENT OF FAIR EMPLOYMENT AND HOUSING v. CITY OF FULLERTON, CALIFORNIA, a California Municipality, Respondent. ---------- SAUL A. MONTERO, Complainant.	Case No. E200405 T-1098-00-pe C 05-06-047 08-05-P DECISION ON RECONSIDERATION

Administrative Law Judge Joseph A. Ragazzo heard this matter on behalf of the Fair Employment and Housing Commission on May 1, 2, 3 and 31, and June 1, 27 and 28, 2007, in Los Angeles, California. Joseph H. Duff, Senior Staff Counsel, represented the Department of Fair Employment and Housing. Steve A. Filarsky, Esq., of Filarsky & Watt, LLP, represented respondent City of Fullerton. Complainant Saul Montero and respondent's representative Laura Giannetti-Mercer attended the hearing. After receipt of the transcripts, and the parties' post-hearing closing briefs, the last of which was received by the Commission on October 12, 2007, the case was deemed submitted.

Administrative Law Judge Joseph A. Ragazzo issued his proposed decision on February 5, 2008. On February 26, 2008, the Commission adopted the proposed decision in its entirety and designated it as a precedential decision of the Commission. (FEHC Case No. 08-04-P)

On February 29, 2008, the Commission received a letter from respondent City of Fullerton dated February 26, 2008, requesting that the Commission not adopt the Proposed Decision, and in the alternative, reduce the proposed remedy pursuant to California Code of Regulations, title 2, section 7434, subdivision (a)(2). Respondent further requested that the Commission make a technical change to the Proposed Decision with regard to the post-judgment interest rate as applied to public entities.

On February 29, 2008, the Commission determined that respondent's request constituted a Petition for Reconsideration pursuant to California Code of Regulations, title 2, section 7436.

On March 13, 2008, the Department of Fair Employment and Housing filed a brief opposing any reduction to the remedies, but agreed with respondent that the post-judgment interest rate on awarded damages should be reduced from ten percent per annum to seven percent per annum.

On March 24, 2008, the Commission granted respondent's Petition for Reconsideration with regard to the reduction in the post-judgment interest rate only. After consideration of the entire record, the Commission makes the following findings of fact, determination of issues, and order.

FINDINGS OF FACT

1. On December 17, 2004, Saul A. Montero (Montero or complainant) filed a written, verified complaint with the Department of Fair Employment and Housing (DFEH) against City of Fullerton. The complaint alleged that City of Fullerton discriminated against complainant based on his disability, bilateral hearing loss, by denying him selection to the position of Maintenance Worker, and by denying him reasonable accommodation, in violation of the Fair Employment and Housing Act (FEHA or Act). (Gov. Code, § 12900 et seq.) The complaint further alleged that on October 18, 2004, City of Fullerton terminated complainant's employment as a Laborer, based on his disability.

2. The DFEH is an administrative agency empowered to issue accusations under Government Code section 12930, subdivision (h). On December 16, 2005, Suzanne M. Ambrose, in her then official capacity as Director of the DFEH, issued an accusation against City of Fullerton, California, a California municipality (City of Fullerton or respondent).

3. The DFEH's accusation alleged that respondent discriminated against complainant in violation of Government Code section 12940, subdivision (a), by refusing to hire complainant into the position of Maintenance Worker, and by subsequently terminating him from his job as a Laborer, based on his physical disability (bilateral hearing loss) or history of a disability. The accusation further alleged that respondent violated Government Code section 12940, subdivisions (m) and (n), by failing to provide complainant with any reasonable accommodation for the Maintenance Worker position, and by failing to engage in a timely, good faith interactive process to determine effective reasonable accommodation. Further, the accusation alleged that respondent violated Government Code section 12940, subdivision (k), by failing to take all reasonable steps to prevent discrimination from occurring.

4. On July 7, 2003, respondent City of Fullerton hired complainant, then 21 years old, as a Laborer. The position was a temporary, hourly job for which complainant was paid a base pay of $7.75 per hour, with no sick leave, vacation or other benefits. Complainant was assigned to the Streets Division in the Maintenance Services Department, cleaning up and sweeping parking lots in downtown Fullerton. He worked 40 hours a week, starting his shift at 3:00 a.m.

5. During the entire period that complainant worked for respondent, Gene Viramontes was the Street Superintendent and the head of the Maintenance Services Department for the City of Fullerton, and Dan Diaz was complainant's immediate supervisor.

6. Complainant's duties as a Laborer included using a gas-powered backpack blower to clear leaves and debris from streets and city parking lots. Complainant was required to wear earplugs, protective eyewear, and a face mask while operating the blower, and typically worked as part of a two-person team, accompanied by Andy Arzola, a permanent full-time Maintenance Worker. As part of his duties, complainant also cleaned out gutters and storm drain structures in parking lots after it rained. On several occasions when his work partner was absent, Montero performed his work alone. Arzola felt that complainant "was a very good worker," had "a good attitude," and "was always on the ball getting his work done."

7. On February 24, 2004, complainant submitted an application for a position with the City of Fullerton as a Maintenance Worker with the Maintenance Services Department. This position was a promotional full-time civil service job that had a base pay of $11.13 per hour with benefits. The Maintenance Worker position was only open to current City of Fullerton employees. Based on custom and practice, the first opportunity for Laborers to become permanent employees with City of Fullerton would be for them to apply for a Maintenance Worker position.

8. To qualify for the Maintenance Worker position, an applicant had to be able to perform routine maintenance and repair practices, to perform strenuous manual labor, to operate power equipment, and to understand oral and written instructions. An eligible candidate was also required to have completed the tenth grade, and to have six months of experience performing maintenance or laboring duties. The essential duties and responsibilities of a Maintenance Worker were very similar to Montero's duties as a Laborer. As a Maintenance Worker, Montero would be required to perform manual labor and operate job-related equipment, including power tools and sweepers, in order to clean public streets, parks, and other city facilities. A successful Maintenance Worker applicant would be assigned to one of three divisions within the Maintenance Services Department: the Streets Division, Landscape Division, or Building and Facility Maintenance Division.

9. At the time complainant submitted his application for Maintenance Worker, he had completed the twelfth grade, and had over seven months of experience working as a Laborer for City of Fullerton.

10. After receiving complainant's application, respondent determined that complainant was qualified for the Maintenance Worker position and placed Montero on the eligible list. In July 2004, when a vacancy arose, complainant was recommended for the position by supervisors Dan Diaz and Doug Reneau, who were familiar with complainant's work performance as a Laborer. Complainant was interviewed for the position by Street Superintendent Gene Viramontes. Viramontes determined that Montero was able to perform the essential duties and responsibilities and was the best qualified candidate for the vacant position.

11. The specific Maintenance Worker position for which complainant had applied involved primarily cleaning storm drains, drainage channels, and catch basins for the Streets Division. As a permanent Maintenance Worker, however, complainant could be transferred to other crews within the Streets Division. As a Maintenance Worker assigned to storm drain detail, complainant would be responsible for traveling to specific streets within the City of Fullerton, setting up safety sites, and cleaning up trash in storm drains located on street corners or in flood control channels. A Maintenance Worker assigned to storm drain detail typically worked alone, and had to be aware of moving traffic and his or her surroundings.

12. On July 28, 2004, City of Fullerton extended to complainant a written offer of employment for the position of Maintenance Worker, conditioned on complainant successfully completing a "post-offer-of-employment medical examination" conducted by a City-approved medical facility. Complainant signed the conditional offer, acknowledging that he had received a copy and understood the requirements he needed to meet to obtain the job.

13. City of Fullerton contracted with Concentra Medical Centers to perform employment-related medical examinations. Dana R. Johnson, M.D., worked at Concentra Medical Center, located in Placentia, California, as a medical examiner.

14. On July 29, 2004, complainant reported for his medical examination at Concentra Medical Center, bringing with him a copy of the written job description for the Maintenance Worker position. At the medical center, complainant underwent a physical examination, which included a back evaluation, toxicology screening test, a vision test, and an audiometric exam. At the conclusion of the examination, Dr. Johnson told complainant that his hearing test results were "bad." Complainant was surprised, as he was not aware that he had any problems with his hearing.

15. Pam Miller was employed by the City of Fullerton as an Employee Benefits Specialist, in the Personnel/Risk Management Department. Miller's duties included reviewing records for new employees' hiring, and post offer-of-employment physical examinations.

16. On July 30, 2004, Dr. Johnson sent Pam Miller a copy of complainant's medical examination results, which indicated that complainant was "able to perform essential functions as listed," but noted that Montero "has significant hearing loss" in both ears, "needs hearing aids" and recommended that complainant follow up with his primary care physician.

17. On or about August 3, 2004, complainant asked Miller about the status of his application for Maintenance Worker. Miller told Montero that he did not pass the hearing examination and that he should follow up with a visit to his primary care physician. When complainant explained that he had no health insurance and no primary care physician, Miller said that he should find a low-cost clinic instead. Complainant asked Miller if his hearing test results meant he was barred from the permanent appointment to Maintenance Worker. Miller replied that she did not know.

18. After receiving complainant's medical report from Dr. Johnson, but on a date not specified in the record, Miller wrote "DNQ," which stood for "Does Not Qualify," on the cover of a page entitled Summary of Physical Exam.

19. After learning from Miller that he had not passed the hearing examination, complainant arranged to be examined on his own by audiologist Harlan Carroll at the Southern California Kaiser Permanente Medical Group. On August 10, 2004 Carroll determined that complainant had a hearing loss below 40 decibels between 1000 to 4000 hertz in his right ear. Carroll recommended that complainant use a hearing aid "at least [in his] right ear, possible [sic] left – results would be good word recognition." Complainant gave copies of his audiogram results to Pam Miller and Dr. Johnson at Concentra Medical Center.

20. On about August 17, 2004, Pam Miller contacted Dr. Johnson, asking about complainant's ability to perform his duties in his current position as a Laborer. Dr. Johnson responded that same day by email stating, in pertinent part, that:

> [I] feel he can perform the usual and customary physical duties in his job description.

Dr. Johnson further stated that in the event of an "emergency," Montero "would need some type of method to communicate with him," and that complainant's "best option…would be to wear bilateral hearing aids." Alternatively, Dr. Johnson suggested that other acceptable options would be for complainant "to work as a member of a team," or "have someone 'buddy up' with him," in order to lessen any chance of injury.

21. After reviewing Dr. Johnson's email, Pam Miller determined that City of Fullerton could not hire complainant as a Maintenance Worker, and that certain restrictions should be placed on his ability to work as a Laborer. That same day, August 17, 2004, Miller wrote a memorandum addressed to complainant entitled "Re: Post Offer Employment Physical Results" with copies to Street Superintendent Gene Viramontes, Supervisors Dan Diaz and Doug Reneau, and to Risk Management Analyst Pamela Mackie.

22. In the August 17, 2004 memorandum to complainant, Miller wrote that according to Dr. Johnson's Summary of Physical Exam:

> [y]ou are not able to perform the essential functions of the position of Maintenance Worker…Therefore the City is unable to hire you as a Maintenance Worker.

Miller further wrote that, following the recommendations of Dr. Johnson, respondent now required complainant to "work as a member of a team" in his duties as a Laborer. At the end of complainant's shift on August 17, 2004, Montero's supervisor Dan Diaz delivered a copy of the memorandum to complainant.

23. On receiving Miller's memorandum, complainant felt extremely disappointed that he was not going to get promoted to the position of Maintenance Worker. He also felt hopeless about ever getting a permanent position with City of Fullerton.

24. On a number of occasions throughout August and September, 2004, complainant asked his supervisor, Dan Diaz, about the status of his promotion to the Maintenance Worker position, and whether he could be retested for the position. Diaz referred complainant back to Pam Miller. When complainant asked Miller about the status of his permanent appointment, she said that he should check back with his supervisors. On one occasion during that period, Miller told complainant that it was a safety issue, giving one example of how dangerous it could be if there was a car coming at him from the street at 100 mph. During that period but on a date not specified in the record, Miller gave complainant a computer print-out showing hearing aids available in the price range of $1,800 to $2,300.

25. With the help of his mother, complainant searched for a low cost hearing aid, which he was able to purchase in early September 2004. Complainant believed that by complying with Dr. Johnson's recommendation that he wear a hearing aid at work, he still would have a chance at being appointed to a permanent position as a Maintenance Worker. On September 10, 2004, Montero was tested using his newly acquired hearing aid at the HearX clinic in Whittier, California. Montero had arranged for the auditory exam on his own, and later provided copies of the results to respondent.

26. After complainant had purchased the hearing aid and started using it at work, Miller told Montero that he should get his hearing reevaluated by Dr. Johnson. Complainant believed that once he had obtained the hearing aid and had been retested by Dr. Johnson, he would be eligible for promotion to the permanent Maintenance Worker position.

27. On the morning of September 17, 2004, complainant was reevaluated by Dr. Johnson at Concentra Medical Clinic, with complainant wearing his hearing aid. Dr. Johnson faxed the exam results to Miller indicating that complainant passed the audiogram.

28. Later that same day, Pam Miller contacted Dr. Johnson by email, asking for a "follow up about [complainant's] ability to work as a Laborer," given that he was now using a hearing aid. Miller's email made no mention of Montero's ability to work as a Maintenance Worker.

29. Dr. Johnson responded, stating that complainant:

> [a]s the result of his use of a hearing aid, can execute the duties of his job description both independently and as part of a team.

Dr. Johnson further stated that:

> I view the use of the hearing aid as absolutely mandatory in the execution of his job duties… This is a safety matter…. The patient at all times at work should have a functioning hearing aid.

30. Later that same day, on September 17, 2004, Pam Miller wrote a memorandum to complainant, titled "Re: Laborer Position with the City," with copies to Gene Viramontes and Dan Diaz. In the memorandum, Miller wrote that, given Dr. Johnson's findings, the restriction requiring complainant to work with another employee was now "eliminated," and he was now permitted to work "independently," but that he must wear his hearing aid at all times while at work. Miller's memorandum made no mention of the conditional offer for the Maintenance Worker position.

31. After receiving Miller's memorandum, complainant contacted Miller and asked if he could still be considered for the Maintenance Worker position. Miller responded that the position was now "closed."

32. From the date he purchased his hearing aid, complainant fully complied with Dr. Johnson's instruction that he wear it while working.

33. On September 30, 2004, complainant approached Street Superintendent Viramontes about whether he would now be able to get a permanent appointment as a Maintenance Worker. Viramontes asked complainant's immediate supervisor Dan Diaz to join them in his office. Complainant told Diaz and Viramontes that he was upset about not getting hired as a Maintenance Worker, and expressed his view that he had not been treated fairly since he believed he had worked hard, obtained a hearing aid, and deserved to be promoted. After giving complainant the opportunity to explain his feelings, Viramontes told complainant, "Being bleak about it, I don't want you for the job." When complainant asked him why not, Viramontes said that he did not have to give complainant an answer, would not do so, and that he could terminate complainant's employment at any time. Viramontes also stated that he and Miller had the final say regarding who they hired, and mentioned that Montero did not have a union to back him up.

34. On October 8, 2004, City of Fullerton appointed David Chavez, Jr., to the Maintenance Worker position for which complainant had applied.

35. After being told that he would not be hired as a Maintenance Worker at the meeting with Viramontes and Diaz, complainant became withdrawn and less communicative. On several occasions after Montero had completed his work shift, he refused to meet or interact with Diaz. Diaz believed that complainant displayed a negative and hostile attitude toward him.

36. On October 18, 2004, Gene Viramontes signed a Personnel Action Form terminating complainant's employment on the basis that "employee demonstrated [sic] negative attitude towards his supervisors and superintendent." That same day, Diaz told complainant that he was fired, asked him to return his keys, and escorted him off the premises.

37. On or about October 20, 2004 complainant telephoned Diaz to discuss why he had been fired. Diaz told him that the City of Fullerton did not need his services any longer and that complainant's "thousand hours were up" or words to that effect.

38. Complainant had suffered symptoms of depression for three years prior to his employment with City of Fullerton. Complainant's depression lifted as he began working as a

City of Fullerton Laborer. Complainant enjoyed his Laborer's job, and felt that he had found a place where he could advance to be a Maintenance Worker and have a career. He felt a sense of optimism for the first time about his future. When complainant learned of his hearing loss, he was very disappointed because he "desperately wanted" the promotion and was not expecting any obstacles in his path.

39. After complainant was terminated, he felt discouraged and hopeless. His depression returned. He was upset about losing his job and had to take part-time jobs. Without a steady job, he could not pay his bills and was forced to move back in with his mother and sister. Complainant had episodes of severe anxiety, worrying about the future and his finances. He was irritable, had trouble concentrating, lost his appetite, could not sleep and was constantly on edge.

40. In December 2005, complainant purchased medical insurance through Kaiser Permanente which gave him medical coverage starting February 1, 2006. On February 2, 2006, complainant began counseling for his depression with Marguerite Dastoor, a Licensed Clinical Social Worker at the Kaiser West Covina Psychiatry Department. Dastoor diagnosed complainant as suffering from adjustment disorder with anxiety. She referred him both to an anxiety disorder group and to a psychiatrist to manage his symptoms of anxiety and depression. Complainant thereafter attended group meetings and took anti-depressant medication proscribed by Dr. Cecilla Limtao, a licensed psychiatrist. Complainant saw Dastoor again on April 18, 2006 and November 2, 2006. By the November session with Dastoor, complainant's anxiety had improved with the techniques that he learned in his group and his depression had also improved.

41. Soon after complainant was terminated, he looked steadily for other employment and applied for numerous jobs, including maintenance work positions with other public entities. Complainant was able to obtain various types of part-time work after he was fired by respondent.

42. Between November 18, 2004 and February 2004, Montero earned approximately $1,400 as a driver for a repossession company, which paid him $25.00 for each towed vehicle. From February 2005 through May 2005, complainant drove a dump truck for Faust Hauling and Moving, and was paid between $7.00 and $8.00 per hour, earning approximately $1,000. From May 5, 2005 through September 10, 2005, complainant was paid $9.00 per hour at CLP Resources, earning approximately $6,480.00 during that period. From September 10, 2005, through March 8, 2007, Montero worked full time for the City of Alhambra as a seasonal worker, and was paid between $9.67 and $10.27 per hour, or about $1,600 per month, earning approximately $31,200.00 during that period.

43. During the entire time that complainant was employed by City of Fullerton, respondent did not have any written policy or procedures regarding reasonable accommodations for disabled employees or for providing an interactive process for workers with disabilities. City of Fullerton also lacked a complaint procedure for addressing and resolving employees' complaints of discrimination or requests for reasonable accommodation.

DETERMINATION OF ISSUES

Liability

The DFEH alleges in its accusation that respondent City of Fullerton discriminated against Montero based on his physical disability by failing to promote him to Maintenance Worker, and by subsequently terminating his employment as Laborer. The DFEH further alleges that respondent failed to engage in the interactive process and to provide reasonable accommodation for complainant's disability, and failed to take all reasonable steps to prevent discrimination from occurring. (Gov. Code, § 12940, subds. (a), (n), (m) and (k).)

A. Complainant's Physical Disability Under FEHA

Government Code section 12926, subdivision (k), states that a "[p]hysical disability" includes, in relevant part, having any disorder, condition, or anatomical loss that affects a special sense organ and limits a major life activity. "Limits" is determined without regard to mitigating measures such as assistive devices, prosthetics, or reasonable accommodations, unless the mitigating measure itself limits a major life activity. Under the Commission's regulations, "hearing" is a major life activity. (Cal. Code Regs., tit. 2, § 7293.6, subd. (e)(1)(A)(2)(a).)

The record established that complainant had right ear hearing loss that, based on the medical findings of both Dr. Dana Johnson and Dr. Harlan Carroll, required an assistive device, a hearing aid. Complainant's hearing impairment affected a "special sense organ," limiting his ability to hear without a hearing aid, according to the medical evidence presented at hearing.

Government Code section § 12926, subdivision (k)(4), also defines physical disability as "being regarded or treated by the employer … as having, or having had, any physical condition that makes achievement of a major life activity difficult." The record established that respondent learned of complainant's hearing impairment on receipt of Dr. Johnson's medical report on July 30, 2004. Thereafter, the evidence showed that respondent regarded complainant as a person with a disability, based on Dr. Johnson's report, by designating complainant "DNQ" [does not qualify] for the permanent position based on his hearing loss, and mandating that he work as part of a team as a Laborer.

Accordingly, the DFEH established that complainant was a person with a physical disability within the meaning of the Act.

B. Disability Discrimination (Gov. Code, § 12940, subd. (a).)

The DFEH alleges that respondent City of Fullerton discriminated against complainant based on his disability by disqualifying him from the permanent position as a Maintenance Worker after he had been conditionally offered the position. (Gov. Code, § 12940, subd. (a).) The DFEH further contends that respondent discriminated against complainant based on his disability by terminating his employment as a Laborer on October 18, 2004. Respondent denies that it discriminated against Montero in failing to promote him to Maintenance Worker, and also

maintains that it had a unilateral right to fire Montero as an at-will employee. Further, respondent denies that complainant's disability played any role in its decision to terminate Montero.

Government Code section 12940, subdivision (a), prohibits discrimination based on an employee's physical disability.[1] Discrimination is established when a preponderance of the evidence demonstrates a causal connection between complainant's disability and an employer's adverse action. The evidence need not demonstrate that complainant's actual or perceived disability was the sole or even the dominant cause of the adverse employment action. If the disability was just one of the factors that influenced respondent, discrimination has been established. (*Dept. Fair Empl. & Hous. v. Seaway Semiconductor, Inc.* (July 5, 2000) No. 00-03-P, FEHC Precedential Decs. 2000, CEB 1, p. 19 [2000 WL 33943383 (Cal.F.E.H.C.)]; *Watson v. Dept. of Rehabilitation* (1989) 212 Cal.App.3d 1271, 1290; *Dept. Fair Empl. & Hous. v. Raytheon Co.* (July 6, 1989) No. 89-09, FEHC Precedential Decs. 1988-89, CEB 10, pp. 15-16 [1989 WL 1111573 (Cal.F.E.H.C.)] affd. *sub nom. Raytheon Co. v. Fair Empl. & Hous. Com.* (1989) 212 Cal.App.3d 1242.)

1. Failure to Promote Complainant to the Position of Maintenance Services Worker

The record established that respondent disqualified complainant from promotion to Maintenance Worker soon after Dr. Johnson reported that Montero had a hearing disability. Miller's August 17, 2004 memorandum written to complainant stated that City of Fullerton was unable to hire Montero because he could not perform the essential functions of a Maintenance Worker. The DFEH asserts that notwithstanding his hearing disability, complainant could perform the essential functions of the position, with or without reasonable accommodation. Respondent asserts that complainant could not.

The Essential Functions of a Maintenance Services Worker

Under the FEHA, an employer may refuse to hire or terminate an employee with a physical disability "[w]here the employee, because of his or her physical or mental disability, is unable to perform his or her essential duties even with reasonable accommodations…." (Gov. Code § 12940, subd. (a)(1); Cal. Code Regs., tit. 2, § 7293.8, subd.(a); *Cassista v. Community Foods, Inc.* (1993) 5 Cal.4th 1050, 1056.) To prove disability discrimination under the FEHA, the DFEH must establish that complainant was a qualified individual with a disability, i.e., that he could perform the "essential functions" of the job as a Maintenance Worker with or without reasonable accommodation. (*Green v. Superior Court* (2007) 42 Cal. 4th 254, 262.)

Government Code section 12926, subdivision (f), defines "essential functions" as "the fundamental job duties of the employment position that the individual holds or desires." Factors to be considered in determining the essential functions of a particular job include the written job descriptions prepared before advertising for the job, the time spent on the job performing the

[1] Under the FEHA, it is unlawful for an employer, because of the physical disability of any person, to refuse to hire or employ the person or to bar or to discharge the person from employment, or to discriminate against the person in compensation or in terms, conditions, or privileges of employment, unless based upon a bona fide occupational qualification. (Gov. Code, § 12940, subd. (a).)

function, and the current work experience of incumbents in similar jobs. (Gov. Code, § 12940, subd. (f).) The evidence presented at hearing established that the fundamental job duties of a Maintenance Worker were to perform strenuous manual labor and operate job-related power equipment in order to repair and maintain public streets, parks, and other city facilities. The record further established that the specific duties of Maintenance Worker were similar to Montero's duties as a Laborer in the Maintenance Services Division, but that as a Maintenance Worker, complainant would be primarily cleaning storm drains in parking lots and city streets.

The DFEH demonstrated that complainant was qualified for the position of Maintenance Worker and had the requisite ability to perform its essential functions. First, the evidence showed that complainant met the educational and experience requirements of the position, and as a result, City of Fullerton placed him on the eligible list and extended to him a conditional offer of employment for the position of Maintenance Worker.[2] Second, the record established that complainant was recommended for the position by supervisors Dan Diaz and Doug Reneau, who were familiar with complainant's abilities and work performance as a Laborer. Third, the evidence established that as a Laborer, complainant effectively performed all of his essential duties, which were similar to the duties of Maintenance Worker, including cleaning storm drains in parking lots. Further, on several occasions when his work partner was absent, Montero performed satisfactorily on his own. Where neither complainant nor his coworkers were even aware of Montero's hearing loss during complainant's employment as a Laborer prior to his post-offer examination, and where complainant performed similar duties as a Laborer and was recommended for the Maintenance Worker position by two supervisors familiar with his work performance, the record strongly supported the DFEH's assertion that he was able to perform the essential functions of the Maintenance Worker position.

Moreover, the medical evidence established complainant's ability to perform the essential duties of a Maintenance Worker. Dr. Johnson's medical examination on July 29, 2004 established that Montero had passed his back evaluation, toxicology screening, visual test and physical examination. Although Dr. Johnson found that complainant had not passed the hearing test, he concluded that complainant was nonetheless "able to perform essential functions as listed," and recommended that Montero consult with his primary care physician regarding his hearing loss and the need for hearing aids.[3] Later, on August 17, 2004 when requested by Miller to determine whether complainant had the ability to continue to perform similar duties as a Laborer, Dr. Johnson responded that complainant "can perform the usual and customary physical duties in his job description," and recommended that Montero wear hearing aids or work as a member of a team to lessen any chance of injury in the event of an emergency. Once

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[2] To qualify for the Maintenance Worker position, an applicant had to have completed the tenth grade, and have at least six months of maintenance or labor experience. The record established that complainant had completed the twelfth grade and had satisfactorily performed his job functions as a Laborer for over a year when City of Fullerton extended to him the conditional offer.

[3] Despite Dr. Johnson's findings and recommendation, on August 17, 2004, Pam Miller, respondent's Employee Benefits Specialist, made the determination that respondent could not hire complainant as a Maintenance Worker, concluding that Montero was "not able to perform the essential functions of the position of Maintenance Worker."

complainant obtained his hearing aid, Dr. Johnson cleared him, finding that with the use of a hearing aid, Montero "can execute the duties of his job description both independently and as part of a team."

Thus, the FEHA demonstrated that complainant was qualified for the position of Maintenance Worker and was also able to perform the essential duties of the position with reasonable accommodation, i.e. the use of a hearing aid.[4] Because respondent refused to hire complainant as a Maintenance Worker because of his hearing disability, the DFEH has established employment discrimination under the Act, subject to any affirmative defenses which are proven by respondent. (Cal. Code Regs., tit. 2, § 7293.8.)

2. Respondent's Affirmative Defenses

Respondent maintains that several defenses excuse City of Fullerton from any liability for discrimination under the Act.

Health and Safety Defense

Under the FEHA, it is a permissible defense for an employer to refuse to hire an employee with a physical disability, even with a reasonable accommodation, when his performance would endanger his own health or safety, or the health or safety of others. (Gov. Code, § 12940, subd. (a)(1); Cal. Code Regs., tit. 2, § 7293.8, subd. (c) and (d).)

Respondent argues that its failure to promote Montero to Maintenance Worker was lawful, because Montero's hearing disability could pose a safety threat to himself and/or others in the workplace. Respondent maintains that Maintenance Workers perform their duties in a dangerous work environment, and are exposed to vehicular traffic, catch basin water, and other outdoor hazards. Respondent asserts that it is essential for Maintenance Workers to be able to hear at an adequate level to avoid oncoming traffic, as well as other potential hazards that an employee may be exposed to when cleaning storm drains. The DFEH counters that respondent has not met its burden because it offered no reliable evidence to establish that the Maintenance Worker position would impose an imminent and substantial degree of risk to the complainant after a reasonable accommodation had been made. The DFEH also argues that respondent has not proven that the complainant, after a reasonable accommodation had been made, would have endangered the health and safety of others when performing the duties of Maintenance Worker.

When the health and safety defense is asserted, the employer has the burden of proving by a preponderance of evidence that the employee's disability while performing the essential functions of the job would pose a threat to himself or others, even with a reasonable accommodation. (Cal. Code Regs., tit. 2, § 7293.8, subds. (c) and (d), see *Raytheon Co. v. Fair*

[4] Respondent also contends in the introduction to its post-hearing brief that "hearing is an essential function" for the position of Maintenance Worker. However, City of Fullerton did not contend that complainant could not hear, nor introduce any evidence or expert testimony regarding a hearing standard requirement necessary for the Maintenance Worker position. Moreover, respondent's argument and the evidence it presented at hearing were specifically geared toward the health and safety defense, discussed below.

Empl. & Hous. Com., supra, 212 Cal. App.3d at p. 1252; citing *Sterling Transit Co. v. Fair Empl. & Hous. Com.* (1981) 121 Cal. App.3d 791.)

To establish a danger to an employee's own health or safety defense, the respondent has the burden of demonstrating by a preponderance of the evidence that its Maintenance Worker functions and complainant's hearing disability together would create an imminent and substantial risk to complainant, even with a reasonable accommodation. (Cal. Code Regs., tit. 2, § 7293.8, subd. (c).) The determination that an individual poses an immediate and substantial danger to himself "must be tailored to the individual characteristics of each applicant," and in relation to the specific, legitimate job requirements. (*Sterling Transit Co. v. Fair Empl. & Hous. Com., supra,* 121 Cal. App.3d at p. 798.)

Similarly, like the danger-to-self defense, the safety-to-others defense requires an individualized showing that safety would be compromised by complainant's job performance, and must be specific to the particular individual. (*EEOC v. United Parcel Service, Inc.* (2005) 425 F. 3d 1060, 1075.) To establish the danger-to-others defense, respondent must demonstrate, by a preponderance of the evidence, that complainant's disability would create danger significantly greater than that posed by someone without a disability performing the job. (Cal. Code Regs., tit. 2, § 7293.8, subd. (d); *Dept. Fair Empl. & Hous. v. City of Anaheim* (Dec. 2, 1982) No. 82-08, FEHC Precedential Decs. 1982-83 CEB 4, pp. 12-14 [1982 WL 36753 (Cal.F.E.H.C.)].)

On the record, respondent failed to meet its burden that complainant's disability while performing the essential functions of Maintenance Worker, would pose a threat either to himself or to others. First, respondent failed to establish evidence of any identifiable, substantial, or immediate danger to complainant's own health and safety either with or without a reasonable accommodation. Complainant's supervisor Dan Diaz testified that the only safety issue regarding a Maintenance Worker's functions and duties was the ability to be aware of traffic and one's surroundings. Respondent raised speculative concerns about future injury to complainant due to his hearing loss. Miller, for example, expressed concern that it could be dangerous if complainant was working on the street and a car came toward him at 100 mph. Respondent in its post-hearing brief, also cited the general example of "the wayward car entering the work zone while complainant, back turned, is pre-occupied with performing his job duties."

Respondent also offered no medical evidence establishing that complainant's hearing loss was such that he could not perceive the flow of traffic or respond to a wayward car while working as a Maintenance Worker. Nor did respondent offer any evidence establishing that complainant's hearing loss would cause a danger to others while he was cleaning storm drains as a Maintenance Worker. Instead, respondent offered hypothetical examples presented by lay witnesses that were based on Dr. Johnson's email to Miller which stated that in the event of an "emergency," Montero "would need some type of method to communicate with him," and his "best option" would be to wear bilateral hearing aids, or alternatively, to have complainant "work as a member of a team" or "have someone 'buddy up' with him," to lessen any chance of injury. Moreover, the evidence established that Dr. Johnson medically cleared Montero on or about September 17, 2004, after complainant obtained a hearing aid and had been tested, and that complainant fully complied with Dr. Johnson's instruction that he wear it while working.

Under the FEHA, the safety defense "has been given narrow scope, the employer must offer more than mere conclusions to present such a defense." (*Ackerman v. Western Electric Co., Inc.* (1987) 860 F.2d 1514, 1519.) Any assessment of whether complainant posed a health and safety risk because of his hearing loss should be based on sound medical judgment or other objective evidence, not on subjective perceptions, irrational fears, or stereotypes. Respondent failed to meet its burden of establishing that complainant's hearing disability, with reasonable accommodation, would create an imminent and substantial risk of harm to himself while working as a Maintenance Worker. Also, respondent did not offer any credible evidence to establish that complainant's hearing disability, with reasonable accommodation of a hearing aid, would create a danger to the health and safety of others that would be significantly greater than that posed by someone without a hearing loss performing the functions of Maintenance Worker. Thus, respondent's health and safety defense fails.

Business Necessity Defense

Respondent next argues that its conduct should be excused under the business necessity defense because denying complainant the promotion was necessary for the safe and efficient operation of the City of Fullerton's business. The DEFH disputes this, and argues that the business necessity defense is inapplicable to the facts in this case.

Business necessity is recognized as a legitimate, nondiscriminatory reason that operates as a defense in disparate impact cases under the FEHA.[5] The applicable test to establish business necessity is whether there exists an overriding legitimate business purpose such that the practice is necessary to the safe and efficient operation of the business. (*City & Cty. of San Francisco*, (1987) 191 Cal.App.3d 976, 989.) However, as the DFEH correctly points out in its post-hearing brief, the business necessity defense is primarily used in disparate impact cases, in instances where it is alleged that a protected class is disproportionately and adversely affected by a facially neutral employment policy. The defense is not appropriate here, as the DFEH did not allege that City of Fullerton had a facially neutral practice or policy which had a disparate impact on persons with hearing disabilities. (See *Stender v. Lucky Stores, Inc.* (N.D. Cal. 1992) 803 F. Supp. 259, 325; *City & Cty. of San Francisco*, *supra*, 191 Cal.App.3d at p. 989.) Notwithstanding, the respondent failed to establish any overriding legitimate business purpose, that would be necessary for the safe and efficient operation of the City business, to justify excluding persons with hearing disabilities such as complainant from working as Maintenance Workers. Thus, this defense asserted by respondent fails.

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[5] Under the Commission's regulations, a business necessity defense may be established:

> Where an employer or other covered entity has a facially neutral practice which has an adverse impact (i.e., is discriminatory in effect), the employer or other covered entity must prove that there exists an overriding legitimate business purpose such that the practice is necessary to the safe and efficient operation of the business and that the challenged practice effectively fulfills the business purpose it is supposed to serve. The practice may still be impermissible where it is shown that there exists an alternative practice which would accomplish the business purpose equally well with a lesser discriminatory impact. (Cal. Code Regs., tit. 2, § 7286.7, subdivision (b).)

Bona Fide Occupational Qualification Defense

Respondent also summarily asserts the bona fide occupational qualification defense (BFOQ) in its post-hearing brief. The DEFH argues that this defense is inapplicable to the facts in this case.

A BFOQ defense may be established where an employer practice "on its face excludes an entire group of individuals on a basis enumerated in the Act (e.g., all women or all individuals with lower back defects)," but which is justified because the employer proves that "all or substantially all of the excluded individuals are unable to safely and efficiently perform the job in question and because the essence of the business operation would otherwise be undermined." (Gov. Code, § 12940; Cal. Code Regs., tit. 2, § 7286.7, subd. (a); see *West v. Bechtel Corp.* (2002) 96 Cal.App.4th 966, 983-984; *Bohemian Club v. Fair Empl. & Hous. Com.* (1986) 187 Cal.App.3d 1, 19-20.)

Respondent presented no factual basis for a BFOQ defense by failing to establish that it had in fact adopted a practice excluding all hearing disabled employees from its workforce. Moreover, the record is void of any credible evidence which would establish that all persons with hearing disabilities such as complainant, would be unable to safely and efficiently perform as Maintenance Workers. Furthermore, respondent failed to establish that the essence of respondent's business operation would be undermined by accommodating an employee with a hearing disability. Thus, based on the foregoing, respondent has not established a BFOQ defense.

In conclusion, this decision finds that complainant had a protected disability under the FEHA, was qualified to work as a Maintenance Worker for respondent City of Fullerton, and that the DFEH has established by a preponderance of the evidence that complainant's disability was the sole factor in City of Fullerton's decision to disqualify him from the position as Maintenance Worker. For all of the reasons stated above, respondent has failed to demonstrate that its failure to promote complainant to Maintenance Worker because of his hearing disability is permissible under the FEHA or excused by any defense.[6]

Accordingly, respondent's failure to appoint complainant to the Maintenance Worker position after he was medically cleared by Dr. Johnson violated Government Code section 12940, subdivision (a).

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[6] Respondent also asserts an "after acquired evidence" defense, claiming that complainant misstated information on his job application and therefore would have been terminated "for cause" in any event. This assertion is without merit. The evidence established that Montero indicated on his 2003 Laborer application that he completed twelfth grade, had attended St. Paul High School, and checked off a box which indicated that he was not a high school graduate but had passed the GED test. Respondent argues that because complainant actually obtained his "adult high school diploma," from Schurr High School, he lied about his educational background and thus would have been terminated. However, even assuming that such statements were not technically accurate, the job only required that an applicant complete the tenth grade, so there was no material misrepresentation. Second, respondent's application itself was confusing, and did not provide space on the application to indicate that an applicant had obtained his/her adult high school diploma instead of a GED.

3. Termination of Employment

Respondent asserts that it had a unilateral right to fire Montero as an at-will employee, and denies that complainant's disability had any role in its decision to fire complainant, asserting that other factors prompted the termination. Respondent argues that complainant's attitude changed around the time that he was required to wear a hearing aid, and that his negative attitude and lack of communication toward his supervisors constituted an unsatisfactory work performance which justified his termination. The DFEH responds, while denying complainant was ever rude or disrespectful, that respondent terminated Montero because complainant expressed his dissatisfaction with not being promoted and the way he was treated by City of Fullerton after respondent learned that he had a hearing disability.

The FEHA is remedial legislation, which declares "[t]he opportunity to seek, obtain and hold employment without discrimination" to be a civil right (Gov. Code, § 12921), and expresses a legislative policy that it is necessary to protect and safeguard that right (Gov. Code, § 12920). The Commission must construe the FEHA broadly, not restrictively. Government Code section 12993, subdivision (a) directs: "The provisions of this part shall be construed liberally for the accomplishment of the purposes of this part." An employer cannot terminate an employee in violation of FEHA, notwithstanding the employee's at-will status. (See Gov. Code, §§ 12926 and 12940.)

The record established that Montero was a very good worker, with good work habits and a positive attitude. These qualities contributed to complainant being considered by his supervisors as the best qualified candidate for the Maintenance Worker position. After receiving the August 17, 2004 memorandum from Miller stating that he would not be hired for the Maintenance Worker position, the record established that complainant felt extremely disappointed, but nonetheless pursued in obtaining a hearing aid on his own, with the belief that respondent might still consider him for the position. Montero continually communicated with his supervisor, Dan Diaz, about fulfilling his desire to get the permanent position. However, when complainant asked Diaz about the status of his promotion to the Maintenance Worker position on numerous occasions throughout August and September, Diaz continually referred complainant to Pam Miller, while Miller continually told him he should check back with his supervisors.

The record does not support respondent's contention that complainant's attitude toward his supervisors changed around the time that he was required to wear a hearing aid. Rather, the record establishes that it was only after complainant's meeting on September 30, when he was told by Diaz and Viramontes that he would not be promoted to the Maintenance Worker position, that he became understandably withdrawn and less communicative. Moreover, this decision finds that any "attitude change" on the part of complainant on or after September 30, 2004 was reasonably related to City of Fullerton's continued stalling on Montero's promotion to the Maintenance Worker position, its failure to properly act under FEHA, and its eventual refusal to promote complainant. Thus, the DFEH has established a causal connection between respondent's termination of complainant and his disability, and has shown that on the facts in this case, complainant's disability was a factor in its decision to fire him, in violation of Government Code section 12940, subdivision (a).

C. Failure to Engage in the Interactive Process (Gov. Code, § 12940, subd. (n))

The DFEH asserts that respondent failed to engage in the interactive process, in violation of Government Code section 12940, subdivision (n). Respondent argues that it acted promptly and diligently once it learned of complainant's hearing disability. Moreover, respondent maintains that after complainant obtained his hearing aid, he was adequately accommodated, which effectively precludes a finding that City of Fullerton failed to engage in the interactive process.

The FEHA provides that it is an unlawful employment practice for an employer "to fail to engage in a timely, good faith, interactive process with the employee or applicant to determine effective reasonable accommodations, if any, in response to a request for reasonable accommodation by an employee or applicant with a known physical or mental disability or known medical condition." (Gov. Code, § 12940, subd. (n), see *Jensen v. Wells Fargo Bank* (2000) 85 Cal.App.4th 245, 262-263.) An employer's obligation to initiate an interactive process is triggered once the employee gives notice of his or her disability and desire for reasonable accommodation, or when the employee's disability is known or apparent. (*Jensen v. Wells Fargo Bank, supra*, 85 Cal.App.4th at p. 261, citing *Barnett v. U.S. Air, Inc.* (9th Cir. 2000) 228 F.3d 1105; *Prilliman v. United Airlines, Inc.*, (1997) 53 Cal.App.4th 935, 950.)

Here, the record established respondent's duty to engage in a timely, good faith, interactive process with complainant was triggered on or about July 30, 2004, when Miller learned from Dr. Johnson that Montero had significant hearing loss and required follow up care and assistance. Instead of inquiring further, Miller told Montero that he did not pass the hearing examination and that he should see his primary care physician, or find a low-cost clinic. When complainant asked Miller if his hearing test results meant he was barred from the permanent appointment to Maintenance Worker, Miller initially replied that she did not know, but later determined, without conferring with complainant, that Montero did not qualify for the position.

The DFEH established that City of Fullerton continually stalled, and kept Montero "in limbo" while he anxiously awaited word from respondent about his pending promotion to Maintenance Worker. On August 17, 2004 before complainant acquired his hearing aid, respondent informed complainant in writing that City of Fullerton could not hire him as a Maintenance Worker. The record established that when complainant asked Diaz about the status of his promotion to the Maintenance Worker position on numerous occasions throughout August and September, Diaz continually referred complainant to Pam Miller, while Miller continually told him he should check back with his supervisors.

Further, the record established that respondent failed to engage in any interactive process with complainant about the Maintenance Worker position, even after he obtained a hearing aid on his own, and was cleared to work by Dr. Johnson on September 17, 2004. Instead, respondent ignored complainant's inquiries about the status of the promotion and his request to be retested for the position, until he was told directly by Viramontes on September 30, 2004, that City of Fullerton did not want him for the job.

Accordingly, this decision finds that respondent failed to undertake timely and good faith efforts to determine whether there was effective reasonable accommodation for complainant's disability, with regard to his promotion as Maintenance Worker. Respondent thereby violated Government Code section 12940, subdivision (n).

D. Failure to Provide Reasonable Accommodation (Gov. Code, § 12940, subd. (m))

The DFEH also asserts that respondent failed in its duty to provide reasonable accommodation to complainant's disability with regard to his promotion as Maintenance Worker. Respondent maintains that it adequately assisted complainant after it learned of his hearing disability, and therefore he was provided with reasonable accommodation under the FEHA.

The FEHA provides that it is an unlawful employment practice for an employer "to fail to make reasonable accommodation for the known physical or mental disability of an applicant or employee." (Gov. Code, § 12940, subd. (m); *Jensen v. Wells Fargo Bank, supra*, 85 Cal.App.4th at p. 256.) The duty of reasonable accommodation is broadly defined by the FEHA to include: "Job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, adjustment or modification of examinations, training materials or policies, the provision of qualified readers or interpreters, and other similar accommodations for individuals with disabilities." (Gov. Code, § 12926, subd. (n)(2).)

The FEHA and the Commission's regulations "clearly contemplate not only that employers remove obstacles that are in the way of the progress" of individuals with disabilities, but also that employers "actively restructure their business in order to accommodate the needs" of their employees with disabilities. (*Prilliman v. United Airlines, Inc*., *supra*, 53 Cal.App.4th at p. 947.) An employer need not undertake an accommodation where the employer can demonstrate that it would produce undue hardship to the employer's operation or if that employee could not perform the essential job functions with or without reasonable accommodations. (Gov. Code, § 12940, subd. (m), Cal. Code Regs., tit. 2, § 7293.9; see *Dept. Fair Empl. & Hous. v. California State University, Sacramento* (May 20, 1988) No. 88-08, FEHC Precedential Decs. 1988-89, CEB 3, p. 19 **[**1988 WL 242638 (Cal.F.E.H.C.)])

Under FEHA, an employer's failure to provide reasonable accommodation to enable an employee with a disability to perform the essential functions of his job constitutes an unlawful employment practice. (Gov. Code, § 12940, subd. (m); *Spitzer v. Good Guys, Inc.* (2000) 80 Cal.App.4th 1376, 1383.) Moreover, an employer's failure to provide reasonable accommodation is a violation of the statute even in the absence of an adverse employment action. (*Jensen v. Wells Fargo Bank, supra*, 85 Cal.App.4th at p. 256.)

Here the record showed that although respondent initially attempted to provide accommodation to complainant in his position as Laborer, by enabling him to continue working in that position by "partnering up" with another employee, respondent failed to extend that accommodation or any other accommodation to complainant regarding his promotion to the position of Maintenance Worker. Further, respondent provided no credible evidence that any such accommodation would cause an undue burden or hardship to respondent's operation.

Thus, the DFEH established that respondent City of Fullerton violated Government Code section 12940, subdivision (m).

E. Failure to Take All Reasonable Steps Necessary To Prevent Discrimination

The DFEH also charges that respondent violated the Act by failing in its affirmative duty, under Government Code section 12940, subdivision (k), to take all reasonable steps necessary to prevent discrimination from occurring.

The DFEH established that respondent lacked a policy addressing reasonable accommodation and the interactive process, and also lacked procedures for employees who requested reasonable accommodation. The record further showed that respondent lacked a complaint procedure for addressing and resolving employees' complaints of discrimination or requests for accommodation.

Accordingly, respondent is liable for violation of Government Code section 12940, subdivision (k), for failing to take all reasonable steps necessary to prevent discrimination from occurring.

Remedy

Having established that respondent violated the Act, the DFEH is entitled to whatever forms of relief are necessary to make complainant whole for any loss or injury he suffered as a result. The DFEH must demonstrate, where necessary, the nature and extent of the resultant injury, and respondent must demonstrate any bar or excuse it asserts to any part of these remedies. (Gov. Code, § 12970, subd. (a); Cal. Code Regs., tit. 2, § 7286.9*; Donald Schriver, Inc. v. Fair Empl. & Hous. Com.* (1986) 220 Cal.App.3d 396, 407; *Dept. Fair Empl. & Hous. v. Madera County* (Apr. 26, 1990) No. 90-03, FEHC Precedential Decs. 1990-91, CEB 1, pp. 33-34 [1990 WL 312871 (Cal.F.E.H.C.)].)

The DFEH's accusation seeks back pay, compensatory damages for emotional distress, and affirmative relief. The accusation also seeks complainant's reinstatement and promotion to the position of Maintenance Worker, or in lieu of reinstatement, front pay and other employment benefits.

A. Make-Whole Relief

1. Back Pay

The DFEH contends that complainant is entitled to lost wages resulting from respondent's failure to promote him to Maintenance Worker, as well as respondent's subsequent termination of Montero's position as Laborer on October 18, 2004. Respondent maintains that because there was no discrimination, complainant is not entitled to lost wages, but noted in its post-hearing brief that Montero's post-termination employment should be accounted for.

Complainant is entitled to receive back pay for the wages he otherwise could have been expected to earn but for respondent's violation of the Act. (*Donald Schriver, Inc. v. Fair Empl. & Hous. Com., supra*, 220 Cal.App.3d at p. 407.) Respondent bears the burden to prove any lack of mitigation of wages. (*Parker v. Twentieth Century-Fox Film Corp.* (1970) 3 Cal.3d 176, 181-182; *Donald Schriver, Inc. v. Fair Empl. & Hous. Com., supra*, 220 Cal.App.3d at p. 407.)

This decision finds that Montero should have been promoted to the Maintenance Worker position by respondent City of Fullerton after an appropriate determination was made regarding whether he needed reasonable accommodation due to his hearing disability. The record established that the latest date that complainant was eligible to work as a Maintenance Worker was on September 17, 2004, after he was cleared to work independently as a Laborer. Therefore complainant shall be entitled to the difference in earnings that he would have made as a Maintenance Worker from September 17, 2005 until his termination on October 18, 2004. This decision also awards complainant lost wages that he would have been paid as a Maintenance Worker after he was terminated, subject to any offset up and until September 10, 2005, when he began working full time as a seasonal worker for City of Alhambra, as calculated below.

The evidence established that complainant earned $7.75 per hour as a Laborer, but as a Maintenance Worker, he would have earned $11.34 per hour, with an additional 10 percent added benefits, for a total of $12.47 per hour.[7] Based on the evidence at hearing, this decision finds that complainant's back pay award is appropriately calculated from October 18, 2004 through September 10, 2005, a period of 47 weeks, less any earnings accrued within that time period. (Cal. Code Regs., tit. 2, § 7286.9, subd. (a)(1).) This decision awards $755.20, which represents the wage difference in what complainant would have earned as a Maintenance Worker rather than as a Laborer between September 17, 2004 and October 18, 2004. This decision awards complainant's back pay at the rate of $498.80 per week, which represents the amount he would have earned as a Maintenance Worker for a total amount of $23,443.60. The sum of this award will be decreased by $8,880.00, which is the amount of complainant's accrued earnings during that time period. Complainant's wage loss is thus calculated as follows:

Dates	**Employer**	**Calculation**	**Amount**
9/17/04 – 10/18/04 (On 10/18/04, respondent fired complainant)	City of Fullerton (Wage differential between Maintenance Worker & Laborer)	20 working days = 160 hours x $4.72 wage differential = $755.20	$755.20
10/18/04 – 9/10/05 (On 9/10/05, complainant hired by City of Alhambra)		47 weeks x $498.80 per week = $23,433.60	$23,433.60
Subtotal before mitigation:			**$24,198.80**

[7] The DFEH and respondent stipulated that as a Maintenance Worker, complainant would have earned an additional 10 percent for employment benefits.

Dates	Employer	Calculation	Amount
11/18/04 – 2/05	Repossession driver	$25 per towed vehicle, earning approximately $1,400 total	-$1,400.00
2/05 – 5/05	Faust Hauling & Moving	$7 - $8 per hour, earning approximately $1,000 total	-$1,000.00
5/05 – 9/05	CLP Resources	$9 per hour, earning approximately $6,480.00 total	-$6,480.00
Total lost wages:		$24,198.80 minus mitigation earnings of $8,880.00 = $15,318.80	**$15,318.80**

Thus, this decision awards lost wages in the amount of $15,318.80, with applicable interest on this amount, at the rate of seven percent per year, from the date such wages would have accrued, until the date of payment. (*Cal. Fed. Savings & Loan v. City of Los Angeles* (1995) 11 Cal.4th 342, 347; *Currie v. Workers' Comp. Appeals Bd.* (2001) 24 Cal.4th 1109, 1115; Civ. Code § 3287.)

2. Reinstatement

The DFEH seeks complainant's reinstatement and promotion to the position of Maintenance Worker for City of Fullerton, or in lieu of reinstatement, front pay and other employment benefits. The record established that complainant expressed great reluctance about returning to work for City of Fullerton at the hearing. This decision therefore makes no award of reinstatement or front pay.

3. Compensatory Damages for Emotional Distress

The DFEH prays for an award of compensatory damages for emotional distress to complainant. (Gov. Code, § 12970, subd. (a)(3).) Respondent asserts that complainant failed to establish a claim for emotional distress and asserts that evidence presented by his mental health counselor was not credible in establishing any basis for an emotional distress claim. The Commission has the authority to award actual damages for emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other nonpecuniary losses in an amount not to exceed, in combination with any administrative fines imposed, $150,000 per aggrieved person per respondent. (Gov. Code, § 12970, subd. (a)(3).)

The determination of whether to award damages for emotional injuries, and the amount of any award for these damages, are based on relevant evidence of the effects of discrimination on the aggrieved person with respect to: physical and mental well-being; personal integrity, dignity, and privacy; ability to work, earn a living, and advance in his or her career; personal and professional reputation; family relationships; and, access to the job and ability to associate with

peers and coworkers. The Commission also considers the duration of the injury and the egregiousness of the discriminatory practice. (Gov. Code, § 12970, subd. (b).)

The evidence at hearing established that as a result of respondent's failure to promote complainant to a permanent position as Maintenance Worker, and its subsequent termination of his employment as Laborer, complainant suffered from significant emotional distress, which lasted for over two years. Montero credibly testified that he felt extremely disappointed after he realized that he was rejected for promotion because of hearing loss. He also credibly testified that he felt hopeless about ever getting a permanent position at City of Fullerton. Because City of Fullerton did not have adequate procedures regarding reasonable accommodations for disabled employees, or for providing an interactive process, complainant became increasingly frustrated, which contributed to feelings of anxiety and his sense of hopelessness. The fact that City of Fullerton also failed to provide to complainant any meaningful complaint procedure for addressing and resolving his requests for accommodation or complaints of discrimination further contributed to his sense of disappointment and hopelessness.

After Montero was fired, his feelings of discouragement and hopelessness increased. His emotional distress intensified into anxiety and depression.[8] Further, without a full time job, he could not meet his expenses, and was forced to move in with his mother and sister. Complainant later underwent counseling for depression with mental health counselor Margaret Dastoor, who testified credibly as an expert witness at the hearing. Dastoor diagnosed complainant as suffering from adjustment disorder with anxiety, and testified that she had recommended that Montero attend an anxiety disorder group and a psychiatrist to manage his symptoms of anxiety and depression. Complainant thereafter took anti-depressant medication proscribed by Dr. Limtao and attended group counseling sessions. The record established that by November 2006, complainant's anxiety and depression had improved.

Accordingly, considering the facts of this case in light of the factors set forth in Government Code section 12970, subdivision (a)(3), respondent will be ordered to pay complainant $45,000 in actual damages for his emotional distress. Interest will accrue on this amount, at the rate of seven percent per year, from the effective date of this decision until the date of payment. (*Cal. Fed. Savings & Loan v. City of Los Angeles* (1995) 11 Cal.4th 342, 347; *Currie v. Workers' Comp. Appeals Bd.* (2001) 24 Cal.4th 1109, 1115; Civ. Code §§ 3287, 3288.)

B. Affirmative Relief

The DFEH asks that respondent be ordered to: cease and desist from discriminating against and refusing to offer reasonable accommodation to persons with disabilities; provide training to all of its management personnel and employees on the FEHA's requirements; and post orders, as forms of affirmative relief, under the Act. The Act authorizes the Commission to order affirmative relief, including an order to cease and desist from any unlawful practice, and an

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[8] Although complainant had suffered from symptoms of depression prior to his employment at City of Fullerton, the record indicated that the symptoms had been alleviated after he started working as a Laborer.

order to take whatever other actions are necessary, in the Commission's judgment, to effectuate the purposes of the Act. (Gov. Code, § 12970, subd. (a)(5).)

Respondent will be ordered to cease and desist from discriminating against and failing to reasonably accommodate employees with disabilities. Respondent will also be ordered to post a notice acknowledging its unlawful conduct toward complainant (Attachment A) along with a notice of employees' rights and obligations regarding unlawful discrimination under the Act (Attachment B). Finally, respondent will be ordered to provide training on disability discrimination, reasonable accommodation, and the interactive process under the FEHA to its current managers and supervisors in its Human Relations and Maintenance Services Departments.

ORDER

1. Respondent City of Fullerton shall immediately cease and desist from discriminating against employees with disabilities, failing to provide reasonable accommodation, and failing to engage in a timely, good faith, interactive process, under the Fair Employment and Housing Act.

2. Within 60 days of the effective date of this decision, respondent City of Fullerton shall pay to complainant Saul Montero the amount of $15,318.80 in lost earnings, with applicable interest on this amount at the rate of seven percent per year, running from the date such wages would have accrued, until the date of payment.

3. Within 60 days of the effective date of this decision, respondent City of Fullerton shall pay to complainant Saul Montero the amount of $45,000.00 in emotional distress damages. Interest shall accrue on this amount at the rate of seven percent per year, running from the effective date of this decision to the date of payment.

4. Within 90 days of the effective date of this decision, respondent City of Fullerton's current managers and supervisors working in the Human Relations Department and Department of Maintenance Services shall, at respondent's expense, attend a training program covering disability-based employment discrimination, reasonable accommodation, the interactive process, and the procedures and remedies available under the Fair Employment and Housing Act.

5. Within 10 days of the effective date of this decision, respondent's authorized representative for the respondent City of Fullerton shall complete, sign and post clear and legible copies of the notices conforming to Attachments A and B. These notices shall not be reduced in size, defaced, altered or covered by any material. Attachment A shall be posted for a period of 90 working days. Attachment B shall be posted permanently.

6. Within 100 days after the effective date of this decision, respondent City of Fullerton shall in writing notify the Department and the Commission of the nature of its compliance with sections two though five of this order.

Any party adversely affected by this decision may seek judicial review of the decision under Government Code section 11523, Code of Civil Procedure section 1094.5 and California Code of Regulations, title 2, section 7437. Any petition for judicial review and related papers should be served on the Department, Commission, respondent, and complainant.

This is a precedential decision of the Fair Employment and Housing Commission pursuant to Government Code section 12935, subdivision (h), and California Code of Regulations, title 2, section 7435, subdivision (a).

DATED: May 6, 2008

FAIR EMPLOYMENT AND HOUSING COMMISSION

GEORGE WOOLVERTON

TAMIZA HOCKENHULL

LINDA NG

CAROL FREEMAN

CARLOS BUSTAMANTE

ATTACHMENT A

CITY OF FULLERTON

NOTICE TO ALL EMPLOYEES AND APPLICANTS

Posted by Order of the
FAIR EMPLOYMENT AND HOUSING COMMISSION
An Agency of the State of California

After a full hearing, the California Fair Employment and Housing Commission has found that City of Fullerton is liable for discriminating against an employee based on disability. (Gov. Code, § 12940, subd. (a).) (*Dept. Fair Empl. & Hous. v. City of Fullerton* (2007) No. 08-_____.)

As a result of the violation, City of Fullerton has been ordered to post this notice and to take the following actions:

1. Cease and desist from violating employees' rights to a discrimination-free workplace, failing to engage in a timely, good faith interactive process to determine reasonable accommodation, and denying them reasonable accommodation under the provisions of the Fair Employment and Housing Act.

2. Pay the former employee back pay and compensatory damages for emotional distress.

3. Post a statement of employees' rights and remedies regarding discrimination based on disability and reasonable accommodation and conduct training about these rights.

Dated: _____ By: _____
Authorized Representative for City of Fullerton

THIS NOTICE IS REQUIRED TO BE POSTED UNDER PENALTY OF LAW BY THE CALIFORNIA FAIR EMPLOYMENT AND HOUSING COMMISSION. IT SHALL REMAIN POSTED FOR NINETY (90) CONSECUTIVE WORKING DAYS FROM THE DATE OF POSTING AND SHALL NOT BE ALTERED, REDUCED, OBSCURED, OR OTHERWISE TAMPERED WITH IN ANY WAY THAT HINDERS ITS VISIBILITY.

ATTACHMENT B

DISABILITY DISCRIMINATION AND REASONABLE ACCOMMODATION OF DISABILITIES

Employees and applicants are entitled to be free from discrimination on the basis of an actual or perceived physical or mental disability. A physical disability includes having any physiological disease, disorder, condition, cosmetic disfigurement, or anatomical loss that affects one or more of the body's major systems and limits a major life activity. A mental disability includes having any mental or psychological disorder or condition that limits a major life activity. If, because of your actual or perceived disability, an employer:

- refuses to hire or promote you,
- fails to provide you reasonable accommodation that is not an undue hardship to the employer,
- fails to engage in a timely, good faith interactive process to determine reasonable accommodation,
- retaliates against you,
- terminates your employment, or
- otherwise discriminates against you in your terms and conditions of employment,

that employer may have violated the Fair Employment and Housing Act.

If you feel that any of these illegal practices have happened to you, or that you have been retaliated against because you opposed these practices, you have up to one year to file a complaint with the state **Department of Fair Employment and Housing (DFEH), at (800) 884-1684**. Further information is also available at the DFEH's website: www.dfeh.ca.gov.

The DFEH will investigate your complaint. If your complaint has merit, the DFEH will attempt to resolve it. If no resolution is possible, the DFEH may prosecute the case with its own attorneys before the Fair Employment and Housing Commission. The Commission may order the unlawful activity to stop, and may also require your employer to reinstate you to your position, to pay back wages and other out-of-pocket losses, to pay damages for emotional injury, to pay an administrative fine, and to make other appropriate relief. Alternately, you may retain your own attorney to take your case to court.

Dated: _____ By: _____

Authorized Representative for City of Fullerton

THIS NOTICE IS REQUIRED TO BE POSTED UNDER PENALTY OF LAW BY THE CALIFORNIA FAIR EMPLOYMENT AND HOUSING COMMISSION. IT SHALL BE POSTED INDEFINITELY, AND SHALL NOT BE ALTERED, REDUCED, OBSCURED, OR OTHERWISE TAMPERED WITH IN ANY WAY THAT HINDERS ITS VISIBILITY.